BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARILYN J. LOVE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,040,865
MOON ABSTRACT CO.	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the November 25, 2008, preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

Claimant alleges she injured her back in a series of repetitive traumas from the work she performed for respondent for more than 13 years. In the November 25, 2008, Order, Judge Avery found claimant injured her back working for respondent and that she provided respondent with timely notice of her accidental injury.

The Judge did not specify the date of accident in the Order. But respondent maintains the Judge found September 28, 2007, was the date of claimant's accident, which respondent alleges was error because (1) claimant was no longer working for respondent at that time, (2) interpreting K.S.A. 2007 Supp. 44-508(d) to find an accident after the last day actually worked nullifies the notice requirements of K.S.A. 44-520 in all repetitive trauma injuries and also creates an irreconcilable conflict between the two statutes, and (3) finding a date of accident after the last day of actual work makes no legal or practical sense and is an absurd result.

Respondent argues the last injurious exposure rule remains the law despite K.S.A. 2007 Supp. 44-508(d) and, therefore, the date of accident for claimant's alleged injuries is her last day of working for respondent on August 17, 2007. Accordingly, respondent contends the notice of claimant's injuries it received on September 28, 2007, was not timely as it was not within the period prescribed by K.S.A. 44-520.

In summary, respondent requests the Board to deny claimant's request for benefits and find: (1) claimant's date of accident was August 17, 2007; (2) claimant failed to provide respondent with timely notice; and (3) claimant was not an employee of respondent on September 28, 2007, should that date be determined to be the date of claimant's accident.

Claimant, on the other hand, argues the Judge correctly interpreted K.S.A. 2007 Supp. 44-508(d) to determine the date of claimant's accident and, therefore, the preliminary hearing Order should be affirmed.

The issue on this appeal is whether claimant provided respondent with timely notice of her alleged accidental injury. But before that issue can be addressed, the appropriate accident date for claimant's alleged repetitive trauma injury must first be determined.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned finds as follows:

Claimant worked for respondent for more than 13 years. Her last day of working for respondent was August 17, 2007. Claimant alleges she sustained repetitive traumas to her back due to the work she performed for respondent. She specifically attributes her present back problems to lifting and handling large, heavy record books in the Register of Deeds office, carrying files, and constantly walking. The record books seemed very heavy to claimant.

Over time claimant's back began hurting. In July 2007, when she consulted her personal physician, claimant's back was hurting and she was having sharp pains going down into her left leg and having numbness in two of her toes on her left foot. Around that time claimant contends she had a conversation with one of her supervisors, Jim Rathke, and told him she needed help handling the Register of Deeds record books as they were hurting her back.[1] Claimant also contends she later told respondent's president, Barbara Moyer, that the books in the Register of Deeds office were too heavy and that her back and side were hurting tremendously.[2]

There is no question that August 17, 2007, was claimant's last day of working for respondent. And the parties stipulated that respondent received written notice of claimant's alleged accidental injury on September 28, 2007.

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[1] P.H. Trans. at 12.

[2] *Id.* at 13.

During the November 21, 2008, preliminary hearing, Judge Avery announced that he was ruling that September 28, 2007, was the date of accident in this claim for purposes of preliminary hearing. The Judge referenced K.S.A. 2007 Supp. 44-508(d). And that statute provides, in part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. . . .

Respondent contends the accident date should be claimant's last day of work on August 17, 2007, and that it cannot occur after that date. But the undersigned disagrees.

Claimant alleges she injured her back as the result of cumulative trauma. By definition cumulative trauma injuries occur over a period of time. Designating only one date as the date of accident for a cumulative trauma injury is a legal fiction. Nonetheless, the Workers Compensation Act provides a solution in K.S.A. 2007 Supp. 44-508(d). The undersigned affirms the Judge's finding that claimant's date of accident for her alleged cumulative trauma injury was the date that respondent received *written notice* of claimant's accident. At this juncture there is no evidence that any other of the criteria set forth in K.S.A. 2007 Supp. 44-508(d) was met. Additionally, the only dates of accident that statute prohibits are the date of and the day before the regular hearing.

Likewise, the undersigned affirms the Judge's finding that claimant provided respondent with timely notice of the accidental injury as the written notice respondent received triggered or set the accident date under K.S.A. 2007 Supp. 44-508(d).

Although it may seem somewhat unusual to have a date of accident that falls after the last day actually worked, that is the result of the literal interpretation of the statute. In the recent *Casco*[3] decision, the Kansas Supreme Court made it clear that the Act is to be followed without adding provisions that are not there. In that decision, the Kansas

[3] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

Supreme Court overturned 75 years of precedent on the basis that earlier decisions did not follow the literal language of the Act. The Court held:

> When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.[4]

In short, when a statute is plain and unambiguous the legislative intent expressed in that language must be followed. Respondent charges that following K.S.A. 2007 Supp. 44-508(d) leads to an absurd result. We do not know why the legislature drafted the statute in the manner it did. In defense of the legislature, some might argue the statute was intended to extend the time period for injured workers to make claims (and provide notice) for the progressive, insidious injuries, which workers may not realize are even related to their work until after they have terminated their employment. On the other hand, there may be some other reason (perhaps *quid pro quo*) why the legislature chose to draft K.S.A. 2007 Supp. 44-508(d) in the manner it did.

Should absurdity be defined as something that is so irrational, unnatural, or inconvenient that it cannot be supposed to be within the intention of men of ordinary intelligence and discretion, K.S.A. 2007 Supp. 44-508(d) cannot be said to be absurd.

The undersigned does not find there is any conflict between K.S.A. 2007 Supp. 44-508(d) and K.S.A. 44-520. The latter statute sets forth the requirement that an injured worker provide the employer with notice of the accidental injury. That statute provides:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as

[4] *Id.* at Syl. ¶ 6.

> provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.[5]

The undersigned finds K.S.A. 2007 Supp. 44-508(d) does not conflict with K.S.A. 44-520. The latter statute does not purport to set the date of accident for a repetitive use or cumulative trauma injury and the former statute does not purport to address the time period for providing notice of the accident or injury to the employer. Moreover, the provisions of K.S.A. 44-520 may be readily applied after the date of accident is determined.

Finally, the undersigned finds that respondent may not avoid responsibility for claimant's alleged cumulative trauma injury because she was no longer working for respondent on September 28, 2007. As indicated above, a cumulative trauma injury occurs over a period of time and designating a single day as the date of accident is a legal fiction. This claim deals with one period of injury while claimant was working for respondent. And the employer-employee relationship existed during the period in question. In short, respondent is responsible for the period of accident alleged, although K.S.A. 2007 Supp. 44-508(d) sets that date of accident after claimant's employment with respondent had ended.

In conclusion, the undersigned affirms the Judge's conclusion that claimant provided respondent with timely notice of her alleged accidental injury.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the November 25, 2008, Order entered by Judge Avery.

IT IS SO ORDERED.

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[5] K.S.A. 44-520.

[6] K.S.A. 44-534a.

Dated this ____ day of February, 2009.

KENTON D. WIRTH
BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge